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IN THE

Supreme Court of The United States

OCTOBER TERM, 1971

No. 71-5671

RICARDO ARREDONDO,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutory provisions involved	2
Statement of the case	2
Argument and Authorities	4
Summary	9
Conclusion	10
Appendix (Opinion and Judgment of Court of Appeals)	11

CITATIONS

CASES: **Page**

Bergen v. United States, 8 Cir., 145 F.2d 181, 187 7

DeLeon v. U. S., 355 F.2d 286 (5th Cir. 1966) 7

Gearhart v. U. S., 272 F.2d 499 6

Kadwell v. U. S., 315 F.2d 667 (1963) 5, 6

Kirshberger v. United States, 392 F.2d 782 (5th Cir. 1968) 6

Leary v. U. S., 395 U.S. 6, May 19, 1969 8

Poole v. U. S., 250 F.2d 396 6

U. S. v. Davis, 212 F.2d 264 7

United States v. Joslin, 434 F.2d 526 (1970) 6

U. S. v. Stayton, 408 F.2d 559 (1969) 6

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The Petitioner, RICARDO ARREDONDO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 8, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Western District of Texas.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 8, 1971. A timely petition for rehearing was denied on September 28, 1971, and this petition for writ of certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether or not the trial court abused its discretion in not permitting this Petitioner to withdraw his plea of guilty prior to the imposition of sentence.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 32(d), states:

> "(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Federal Rules of Criminal Procedure, Rule 11, states:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant *personally* and determining that the plea is made *voluntarily* with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plea or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."
>
> (Emphasis added).

STATEMENT OF THE CASE

On the 20th day of February, 1971, the defendants, RICARDO ARREDONDO and RAMIRO YRLAS, were arraigned on Count Four of a seven-count indictment and entered pleas of guilty to said count before the Honorable Ben C. Connally, United States District Judge for the Southern District of Texas. The remaining six counts of the indictment were dis-

missed as is evidenced by a review of the Criminal Docket of the Court in the Appendix.

On March 29, 1971, the defendants, RICARDO ARREDONDO and RAMIRO YRLAS, appeared before the Court for sentencing. Prior to sentencing the Court was advised that the defendant RICARDO ARREDONDO desired to withdraw his plea of guilty and enter a plea of not guilty. (App. p. 19).

On April 20, 1971, the Petitioner herein appeared before said Court on his motion to withdraw his plea of guilty. (App. p. 21). The material facts of this case were agreed upon and stipulated to between the Government and this Petitioner. They are:

A. That on January 23, 1971, entry was made into the Defendant ARREDONDO'S motel room in Laredo, Texas, and a white substance was found in said room and it was indicated to the Defendant ARREDONDO by the customs agents that said white substance was heroin. (App. pp. 24-25).

B. That on January 25, 1971, at an examining trial, the customs agent testified that he ran a "field test" on said white substance and that, in his opinion, it was heroin. (App. pp. 25,30).

C. That on February 10, 1971, the Defendant ARREDONDO entered a plea of guilty to the fourth count of the indictment. (App. p. 25).

D. That several days after the Defendant ARREDONDO'S plea of guilty, the attorney for the Defendant ARREDONDO was apprised for the first time by the Government that the white substance found in the said defendant's motel room was not heroin but was, in fact, procaine. (App. p. 25).

E. That the marijuana alleged in the indictment was found in an automobile in Encinal, Texas, some thirty miles north of Laredo in the possession of the co-defendant, RAMIRO YRLAS, and not in the presence of the Defendant ARREDONDO. (App. p. 42).

The Defendant RICARDO ARREDONDO testified that he was not guilty of the fourth count of the indictment (Marijuana Tax Act), but that he entered a plea of guilty because he was led to believe that heroin was found in his room, and if he had known that the substance found was not heroin, he would not have entered a plea of guilty. (App. pp. 28-29). The Defendant ARREDONDO further testified that after he had entered a plea of guilty, but *before sentencing*, he was advised for the first time that the white substance found in his motel room was not heroin, and because of this he wished to withdraw his plea of guilty. (App. p. 29).

ARGUMENT AND AUTHORITIES

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT PERMITTING THIS PETITIONER TO WITHDRAW HIS PLEA OF GUILTY PRIOR TO THE IMPOSITION OF SENTENCE

The Petitioner, RICARDO ARREDONDO, filed his motion to withdraw his plea of guilty for the reason that he was led into believing that the white substance found in his motel room was heroin when in truth and in fact it was procaine.

Petitioner submits that, on four different occasions, he was influenced into believing that the white substance found in his room was heroin, when in truth and in fact it was procaine. The *first occasion* was on the date of his arrest, at which time the customs agent advised him that said substance was heroin. (App. p. 24). The *second occasion* was on the date of the examining trial in which again the customs agent testified under oath that he ran a "field test" on said

white substance and that in his opinion it was heroin. (App. p. 25). The *third occasion* was when the seven-count indictment was returned and Count Five, Count Six and Count Seven charged this Petitioner exclusively of smuggling and transporting 78 grams of heroin into this country. The *fourth occasion* was when this Petitioner appeared before the Honorable Ben C. Connally and the Government advised the Court that upon the arrest of this Petitioner heroin was found in his motel room. (App. p. 16). Had he known that the white substance allegedly found in his motel room was not heroin, this Petitioner would not have entered a plea of guilty. (App. pp. 28-29). It should be borne in mind that the marijuana seized was found in the possession of another person (the co-indictee YRLAS) in another town (Encinal, Texas) approximately thirty miles from where the Defendant RICARDO ARREDONDO was arrested. (App. p. 42).

Rule 32(d), Federal Rules of Criminal Procedure, permits the motion for withdrawal of the plea to be made at any time *before* sentencing.

Rule 32(d) provides further that *after* sentence has been imposed, withdrawal of a plea of guilty or nolo contendere will be allowed only "to correct manifest injustice." It makes no such limitation on a withdrawal of a plea *prior to sentencing*. Thus, the Rule clearly recognizes an important distinction depending on the stage at which the withdrawal is sought.

As Judge James R. Browning has said for the Ninth Circuit in *Kadwell v. U. S.*, 315 F.2d 667 (1963):

> "This distinction rests upon practical considerations important to the proper administration of justice. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence,

> the accused might be encouraged to plead guilty to test the weight of the potential punishment, and withdraw the plea if the sentence were unexpectedly severe. . . ."

In *Gearhart v. U. S.*, 272 F.2d 499, it was stated:

> ". . . 'Leave to withdraw a guilty plea prior to sentencing should be freely allowed.' . . ."

In light of this distinction, the Rule is clearly expressed that it would seem that if leave to withdraw a plea of guilty is sought before sentencing, such leave should be freely allowed.

Poole v. U. S., 250 F.2d 396, states:

> " 'The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems *fair* and *just*.' "
> (Emphasis added).

Petitioner submits that neither the Court nor the prosecution would have suffered any inconvenience in permitting him to withdraw his plea of guilty and enter a plea of not guilty.

See *U. S. v. Stayton*, 408 F.2d 559 (1969), which states:

> "The motion to withdraw a guilty plea protects the rights of an accused to a trial. Therefore, such requests made *before* sentencing 'should be construed liberally in favor of the accused' by the trial courts. *Kirshberger v. United States*, 392 F.2d 782 (5th Cir. 1968); *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963); and *Poole v. United States*, 102 U.S. App.D.C. 71, 250 F.2d 396, 400 (1957), where the court said: 'Leave to withdraw a guilty plea prior to sentencing should be freely allowed.' "
> (Emphasis added).

Petitioner cites the case of *United States v. Joslin*, 434 F.2d 526 (1970), in which it is stated as follows:

". . . The general standard to be applied (the request for leave to withdraw having come prior to sentence) is whether 'for any reason the granting of the privilege seems fair and just.' . . . If the request was made because appellant thought he had a defense, permission to withdraw 'should be rather freely granted.' . . ."

Petitioner submits that it has always been held that a withdrawal of a plea of guilty should be permitted if it was induced by *fraud, imposition, misrepresentation,* or *misapprehension* by Defendant of his legal rights.

The case of *U. S. v. Davis,* 212 F.2d 264, states:

" . . . Where it fairly appears that a plea of guilty 'was made under some mistake or misapprehension' the accused should be permitted to withdraw it. *Bergen v. United States,* 8 Cir., 145 F.2d 181, 187. This principle is clearly implied in Rule 11 of the Federal Rules of Criminal Procedure, 18 U. S. C. . . ."
(Emphasis added).

The Petitioner submits that Rule 11 of the Federal Rules of Criminal Procedure states that a plea of guilty must be entered voluntarily. Appellant submits that at no time did the Court inquire of the Defendant RICARDO ARREDONDO whether he was entering his plea voluntarily or whether he was being induced, pressured, misled, or promised anything to enter said plea of guilty. In fact, the record is completely void of any inquiry by the Court as to the voluntariness of the plea of guilty.

Petitioner submits the case of *DeLeon v. U. S.,* 355 F.2d 286 (5th Cir. 1966), which states:

"Courts must always be diligent to ascertain whether a plea of guilty was *understandingly made,* and when it appears *before sentencing* that such a plea was entered by a defendant who did not understand the charges or

acted as a *result of mistake*, it is an abuse of discretion not to permit the plea to be withdrawn."

(Emphasis added).

The Petitioner further submits that he was not guilty of the Fourth Count of the indictment. This is obvious for the reason that the Court advised this Petitioner that he had a perfect defense to the Fourth Count of the indictment if he claimed his Fifth Amendment rights against self-incrimination as was indicated in the case of *Leary v. U. S.*, 395 U.S. 6, May 19, 1969. (App. p. 15). The Petitioner, believing that the substance found in his motel room was heroin, was in effect pressured into pleading guilty to the Fourth Count of said indictment to which he had an absolute defense. The Fifth Circuit Court of Appeals in its written opinion on Page 4 stated that the said Fourth Count of the indictment was unrelated to the other counts of the indictment. This is difficult to understand and accept for it is obvious that this Petitioner was in effect not guilty of any of the seven counts of the indictment. If this Petitioner had not had a perfect defense to the Fourth Count of the indictment, it would not have been necessary for the trial court to ask and require of this Petitioner to waive a perfect defense to said Fourth Count and further require the Petitioner to sign a form waiving his absolute defense to said Fourth Count of the indictment. (App. p. 9).

The Government in its Brief before the Fifth Circuit Court of Appeals stated that the heroin counts and the marijuana count (or the Fourth Count) are separate and apart from each other, but the Government failed to say that this Petitioner had a perfect defense to the Fourth Count of the indictment as hereinabove stated, and if the Petitioner had known the truth that the substance found in his motel room was not heroin, he obviously would not have plead guilty to

a count to which he had an absolute defense. Further, it should be kept in mind that not only did the Petitioner have an absolute defense to the Fourth Count of the indictment, but that the facts surrounding the alleged marijuana reflect that the same was found thirty (30) miles away from this Petitioner in another town and in the possession of another person. So it stands to reason that this Petitioner, having an absolute defense to the count of the indictment to which he plead, unquestionably was pressured, forced and misled into pleading guilty to the same, believing that the substance found in his room was heroin, when in truth and in fact it was procaine.

For the Fifth Circuit Court of Appeals to say that the Fourth Count of the indictment (marijuana) is unrelated to the heroin counts of the indictment is to ignore the obvious. This Petitioner was influenced 100% to enter a plea of guilty to the Fourth Count of the indictment because of his being misled into believing that the substance found in his room was heroin, when in truth and in fact it was procaine.

SUMMARY

In summary, this Petitioner submits that the trial court erred when it did not permit this Petitioner to withdraw his plea of guilty prior to the imposition of sentence, and the Fifth Circuit Court of Appeals failed to see the relevancy between the marijuana and heroin counts of the indictment. Petitioner further submits that the counts of the indictment are related and that he had an absolute defense to the count of the indictment to which he plead (Fourth Count) and never would have been found guilty of said count if he had not been required to sign a waiver waiving his absolute defense to said count, but was forced into waiving his defense to said count because he was misled into believing that heroin was found in his room, which later developed to be untrue.

Therefore, this Petitioner was not guilty of any of the heroin counts in the indictment and also was not guilty of the Fourth Count of the indictment for the reasons above stated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Dated: October 21, 1971

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1851
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICARDO ARREDONDO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(September 8, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: Defendant below appeals from a sentence of ten years in the federal penitentiary, imposed after his plea of guilty to an indictment charging him with failure to pay the transfer tax on a quantity of marihuana transported across the border from Mexico.

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*Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

Appellant, along with Ramiro Yrlas, was originally indicted on a seven-count indictment charging them, in essence, with smuggling marihuana and heroin into the United States and failing to pay the tax thereon.

Prior to the indictment, and out of appellant's presence, Yrlas had been apprehended and found to be in possession of the marihuana. Entry had been made into appellant's room, and a white substance was found that appellant and customs agents believed to be heroin. At the examining trial on January 25, 1971, a customs agent testified that he ran a field test on the white substance and that, in his opinion, it was heroin.

On February 20, 1971, both defendants were arraigned on the tax count of the indictment and pled guilty. Appellant Arredondo testified, upon explanation by the court of the charge to which he was pleading, that he understood the nature of the charge, that he had committed the acts alleged, and that he understood the seriousness of the violation and the sentence provided by law. Moreover, he signed a waiver indicating that he understood that he had a complete defense to the charge under *Leary v. United States*, 395 U.S. 6 (1969), and, after consultation with his attorney, still wished to plead guilty and waive his defense.

Several days after appellant's plea, appellant and his attorney were apprised for the first time by the Government that the white substance found in appellant's room was not heroin, but was, in fact, procaine.

Appellant made a motion before sentencing to withdraw his plea of guilty based on his mistake in believing the white

substance in his possession to be heroin. After a hearing, the district court denied the motion.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> A motion to withdraw a plea of guilty . . . *may* be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.
> (Emphasis added)

Appellant contends that before sentencing Rule 32(d) *requires* the district court to grant a motion to withdraw his plea. This contention ignores this Court's holding in *Kirshberger v. United States*, 5th Cir. 1968, 392 F.2d 782.

> There is no absolute right to withdraw a guilty plea before the imposition of sentence, but the right to do so is within the sound discretion of the trial court.

392 F.2d, at 787.

Appellant also contends that the district court's denial of his motion was an abuse of discretion because it was undisputed that his guilty plea was the result of a mistake of fact. Cases on this point have uniformly held that withdrawal of a plea should be allowed where the defendant is mistaken as to his *legal rights in regard to the change to which he is pleading. DeLeon v. United States*, 5th Cir. 1966, 355 F.2d 286;

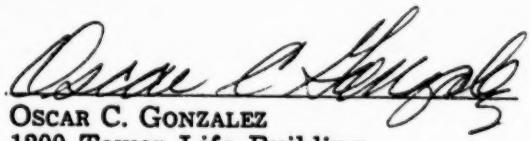
Leonard v. United States, 5th Cir. 1956, 231 F.2d 588; *United States v. Davis*, 7th Cir. 1954, 212 F.2d 264; *Bergen v. United States*, 8th Cir. 1944, 145 F.2d 181. Appellant's argument, however, goes further. He contends that because of his mistake as to the substance of another, unrelated count in the indictment, to which he was not entering a plea or being arraigned, he should be permitted to withdraw his plea of guilty to a separate and unconnected charge. We find no merit in this contention, and therefore

AFFIRM.

Adm. Office. U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

CERTIFICATE OF SERVICE

This is to certify that I, OSCAR C. GONZALEZ, a member of the Bar of the Supreme Court of the United States, pursuant to Supreme Court Rule 33.3(b), have duly mailed, postage prepaid, three (3) true copies of the foregoing Petition for Writ of Certiorari to The Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, and also mailed a copy of same to Mr. Anthony J. P. Farris, United States Attorney, Southern District of Texas, P. O. Box 61129, Houston, Texas 77061.



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Dated: October 21, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-567

RICARDO ARREDONDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A seven-count indictment returned in the United States District Court for the Southern District of Texas charged petitioner with smuggling marihuana and heroin into the United States, failing to pay taxes on the marihuana and the heroin, and conspiracy. A co-defendant was named in the conspiracy and the three substantive counts relating to the marihuana.

On February 20, 1971, petitioner and his co-defendant entered guilty pleas to the charge under former 26 U.S.C. 4744(a)(2) (1964 ed.) of failure to pay

the transfer tax on the marihuana (count 4). After explanation by the court of the charge to which he was pleading and the possible sentence (App. 14), petitioner stated that he understood the nature of the charge, that he committed the acts alleged, and that he understood the seriousness of the violation and the range of punishment to which he was subject (App. 13, 14).

The court then gave petitioner a written form, told him to read it and to sign it only if the statements contained therein were true. Petitioner signed the form which contained the statements that he was entering his plea voluntarily and not as a result of any threat, promise or bargain (App. 10, 15-16). The court also advised petitioner that he had a complete defense to the tax charge under *Leary* v. *United States,* 395 U.S. 6. After consultation with his attorney, petitioner stated that he still wished to plead guilty and waive that defense (App. 15). The court ordered a pre-sentence report and fixed a date for sentencing.

Several days after petitioner's plea, he and his attorney were advised by the government that the substance found in petitioner's room was procaine [1] rather than heroin.

Prior to sentencing, petitioner made a motion to withdraw his plea of guilty to the marihuana tax-count charge on the ground that his plea was due to the mistaken belief—based on the government's representation—that the white substance found in his

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[1] Procaine, a mild anesthetic, is a derivative of cocaine but is not a substance whose importation was forbidden under former 21 U.S.C. 174 (1964 ed.).

room was heroin. At the hearing on the motion it was stipulated that during a search of petitioner's motel room in Laredo, Texas, on January 23, 1971, customs agents discovered a quantity of a white substance. On the basis of a "field test" one of the agents was of the opinion that the substance was heroin (App. 25); it was subsequently found to be procaine.

On the same day (January 23, 1971), petitioner's co-defendant, Ramiro Yrlas, was arrested thirty miles north of Laredo while driving petitioner's car (App. 42). A search of the vehicle revealed over 59 pounds of marihuama concealed in the trunk (App. 16). Petitioner and his co-defendant had been seen together several times before the arrest (App. 16).

The district court denied petitioner's motion to withdraw his plea. It noted that petitioner had stated under oath that his plea was not the result of any trade or bargain with the United States Attorney. It found that the plea was in no way related to the "white powder" and surmised that petitioner's change of mind had come about after the co-defendant had been sentenced (App. 43). (The co-defendant had been sentenced to seven years' imprisonment and the remaining counts against him (all involving marihuana) had been dismissed). The court sentenced petitioner to imprisonment for ten years. The court of appeals affirmed; it rejected the contention that petitioner should have been allowed to withdraw the plea.

The motion to withdraw was properly denied since petitioner showed no mistake of law or fact with respect to the charge at issue. Petitioner had assured the court, before his plea was entered, that he was guilty

of the tax stamp charge with respect to the marihuana. Apart from the reason for the plea conjectured by the district court, petitioner's willingness to waive the defense of self-incrimination may perhaps be explained by his hope that this would lead to dismissal of the smuggling of marihuana charge under former 21 U.S.C. 176a (1964 ed.)—just as it had in the case of the co-defendant—for that charge carried a higher minimum mandatory sentence than a conviction under former 26 U.S.C. 4744 (1964 ed.) (see former 26 U.S.C. 7237 (1964 ed.)). Since petitioner produced no evidence showing misapprehension of any legal or factual right relating to the charge to which his plea was addressed, the trial court was acting within its discretion in denying petitioner's motion to withdraw his plea. There is no absolute right to withdraw a plea of guilty prior to imposition of sentence. *United States ex rel. Scott* v. *Mancusi,* 429 F. 2d 104, 109-110 (C.A. 2), certiorari denied, 402 U.S. 909; *United States* v. *McDaniel,* 425 F. 2d 813 (C.A. 5).

Petitioner also contends that there was a failure to comply with Rule 11, Fed. R. Crim. P., because the trial court told him to read the form and sign it if true, rather than itself addressing the questions to petitioner. Petitioner, who was represented by counsel, was in a position to ask the judge about anything he did not understand or qualify any answer if he wished to do so. The situation was thus not essentially different than it would have been had the judge read aloud the questions on the form. Moreover, the judge did warn the petitioner about his defense under *Leary.* When petitioner persisted in his guilty plea, it was clear that he did so voluntarily.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

☆ U.S. Government Printing Office: 1971—449-615/294